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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

C.T.S. COMPANY, INC.,

Petitioner,

vs.

CORNWELL QUALITY TOOLS CO.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
The Facts and Proceedings Below	5
Reasons for Granting the Writ	10
Conclusion	17

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit.

Appendix B. Order.

Appendix C. Petition for Rehearing and Suggestion for Rehearing in Banc.

Appendix D. Court's Memorandum on Motions for Directed Verdicts.

TABLE OF AUTHORITIES CITED

Cases	Page
Case-Swayne Company, Inc. v. Sunkist Growers, Inc., 369 F.2d 449 (1966), rev. 389 U.S. 384 (1967)	13
Goodman v. United States, 369 F.2d 166 (1966)	16
Horizons Titanium Corp. v. Norton Company, 290 F.2d 451 (1961)	16
Industrial Building Materials v. Interchemical Corp., 437 F.2d 1336 (1970)	13
Lessig v. Tidewater Oil Company, 327 F.2d 459 (1964)	12, 13, 14, 15, 17
Perma Life Mufflers v. International Parts Corp., 392 U.S. 134	15
Times-Picayune Publishing Company v. U.S., 345 U.S. 594 (1953)	11
United States v. Chas. Pfizer & Co., 245 F.Supp. 737 (1965)	12
United States v. Columbia Steel, 334 U.S. 495 (1948)	15
United States v. Consolidated Laundries Corp., 291 F.2d 563 (1951)	11
United States v. Dupont, 351 U.S. 377 (1956)	14
United States v. Singer Mfg. Co. (No. 438, Oct. Term 1962) p. 22, dec. 374 U.S. 174 (1963)	14
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)	14
Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F.2d 762 (1965)	16

Rules

Federal Rules of Appellate Procedure, Rule 4(a) 2
Federal Rules of Civil Procedure, Rule 45 .....15, 16
Federal Rules of Civil Procedure, Rule 61 15

Statutes

Clayton Act, Sec. 3 .....2, 3, 6, 9, 11
Clayton Act, Sec. 4 3
Robinson-Patman Act, Sec. 2(a) ..2, 3, 4, 5, 6, 8, 9, 14
Robinson-Patman Act, Sec. 2(c) 5, 6
Sherman Act, Sec. 1 .....2, 3, 5, 6, 8, 9, 15
Sherman Act, Sec. 2 ..2, 3, 5, 6, 7, 10, 11, 13, 14, 15
United States Code, Title 15, Sec. 1 3
United States Code, Title 15, Sec. 2 3
United States Code, Title 15, Sec. 13(a) 4
United States Code, Title 15, Sec. 14 4
United States Code, Title 15, Sec. 15 .....2, 3
United States Code, Title 15, Sec. 45 11
United States Code, Title 28, Sec. 1254(1) 2
United States Code, Title 28, Sec. 1291 2
United States Code, Title 28, Sec. 1337 2

Textbooks

34 American Bar Association Antitrust Law Journal, Attempt to Monopolize—A Concept in Search of Analysis, p. 165 11

Blecher, Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market" 38 George Washington Law Review (1969), p. 215 .....10, 11

Page

27 George Washington Law Review, Attempt to Monopolize: Its Elements and Their Definition (1958), p. 227 10

Hale and Hale, Market Power Size and Shape Under the Sherman Act (1958), Chap. 9 10

Johnston, Monopolize or Attempt to Monopolize, 3 A.B.A. Antitrust Section Rep. (1953), p. 72 10

5A Moore's Federal Practice, pp. 1716-1717 ....15, 16

42 New York University Law Review, Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market (1967), p. 110 10

Oppenheim and Weston, Federal Antitrust Laws (3d Ed. 1968), p. 307 10

Oppenheim and Weston, Federal Antitrust Laws (3d Ed. 1968), p. 309 14

Scott and Rockefeller, Antitrust and Trade Regulation Today: 1967, a BNA Book (1967), pp. 1-3 .. 11

Stern and Gressman, Supreme Court Practice, 4 ed., pp. 220-223 16

Turner, D. F., Antitrust Policy and the Cellophane Case, 70 Harvard Law Review (1956), p. 281 10

IN THE

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No. .....

C.T.S. COMPANY, INC.,

Petitioner,

vs.

CORNWELL QUALITY TOOLS CO.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

C.T.S. Company, Inc. ("CTS") petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 25, 1971 and its Order of August 31, 1971 denying the petition for rehearing and modifying its written Opinion.

Opinions Below.

The Opinion of the Court of Appeals is officially reported at 446 F.2d 825 (9th Cir. 1971); a copy is attached as Appendix A, *infra*. The Order denying rehearing, rejecting suggestion for a rehearing in banc and modifying its Opinion is not officially reported and a copy is attached as Appendix B, *infra*. The District Court did not write a formal opinion in the case. It did, however, prepare the "Court's Memorandum on Motions for Directed Verdicts", a copy of which is attached as Appendix D, *infra*.

Jurisdiction.

The Judgment of the Court of Appeals was entered on June 25, 1971. A petition for rehearing (App. C) was denied on August 31, 1971, and an order modifying the Opinion was also entered that same day (App. B). This Court has jurisdiction under 28 U.S.C. 1254-(1). The jurisdiction of the trial court, to the extent here relevant, was based on 28 U.S.C. 1337 and 15 U.S.C. 15. The jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291 and Rule 4(a) F.R.A.P.

Questions Presented.

This is a private antitrust action in which the Court of Appeals (though ruling that Petitioner, based on the evidence introduced and offered, has the right to proceed to trial against Respondent for, *inter alia*, alleged violations by Respondent of Section 1 of the Sherman Act, Section 2(a) of the Robinson-Patman Act and Section 3 of the Clayton Act) held that Petitioner was not also entitled to try a claim of attempted monopolization under Section 2 of the Sherman Act. The questions here presented are:

1. Whether Petitioner, though offering to prove Respondent's specific intent to destroy both competition and Petitioner, failed to state a claim under Section 2 of the Sherman Act for attempted monopolization because it did not also offer to prove that Respondent formed a specific intent to gain a monopoly market share.

2. Whether from the evidence admissible and relevant to the determination of Respondent's liability for violations of Section 1 of the Sherman Act, Section 3

of the Clayton Act, and Section 2(a) of the Robinson-Patman Act, the facts establishable together with reasonable inferences could also support a verdict that Respondent formed the specific intent necessary to an attempted monopolization under Section 2 of the Sherman Act.

Statutes Involved.

Section 2 of the Sherman Act, 15 U.S.C. 2, provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several State . . . shall be deemed guilty of a misdemeanor. . . ."

Section 4 of the Clayton Act, 15 U.S.C. 15, provides as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 3 of the Clayton Act (15 U.S.C. 14) provides as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), provides in pertinent part, as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of

Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ."

Statement of the Case.

The Facts and Proceedings Below.

Petitioner ("CTS") was sued on an open account by Respondent, Cornwell Quality Tools Co. ("Cornwell"). for whom CTS was formerly a distributor. At the time CTS answered the complaint below, it also filed its counterclaims, as thereafter amended, which charged, *inter alia,* that Cornwell, a manufacturer and distributor of professional quality mechanic's hand tools, terminated CTS as an exclusive distributor in violation of Section 1 of the Sherman Act and thereafter engaged in conduct violative of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act and Sections 2(a) and 2(c) of the Robinson-Patman Act.

In particular, CTS alleged that Cornwell, prior to terminating CTS, entered into a combination and conspiracy in violation of Section 1 of the Sherman Act with certain of its other distributors to terminate any distributor which purchased merchandise from Cornwell's competitors and that because CTS refused to join the plan, it was cut off; that subsequent to cutting CTS off and upon Cornwell's entering the market, Cornwell, in an effort to destroy CTS or injure its ability to compete effectively, engaged in a course of

conduct in which, *inter alia,* it sold merchandise to customers of CTS at discriminatory prices in violation of the Robinson-Patman Act and in some instances below cost, signed numerous dealers to exclusive dealing contracts in violation of Section 3 of the Clayton Act and Section 1 of the Sherman Act; that in furtherance of its plan to destroy CTS, Cornwell took numerous other predatory steps to financially injure CTS and impair its ability to compete. It was alleged in a separate counterclaim, that all the activities of Cornwell taken together constituted a forbidden attempt by Cornwell to monopolize a part of trade or commerce in violation of Section 2 of the Sherman Act. CTS demanded a jury trial.

The trial court, prior to CTS's concluding its case in chief on its antitrust counterclaims, compelled CTS to make an offer of proof as to the facts which it intended to establish. Thereafter, the trial court directed a verdict against CTS and in favor of Cornwell on all CTS's antitrust counterclaims on the ground that the proffer of proof was insufficient to present a jury issue because the facts alleged as a matter of law did not state a claim (App. D, pp. 11d-13d, 17d).

The Court of Appeals found that the trial court had improperly directed verdicts against CTS with regard to its claims under Section 1 of the Sherman Act, Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act and reversed the judgment accordingly, remanding those issues for trial (App. A, pp. 5a-11a, 14a). With regard to CTS's claims under Section 2(c)[1] of the Robinson-Patman Act (unlawful

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[1]CTS did not raise in its petition for rehearing, nor does it here raise, the correctness of the Court of Appeals' determination with regard to the directed verdict under Section 2(c) of the Robinson-Patman Act.

brokerage) and Section 2 of the Sherman Act (attemped monopolization), it sustained the trial court's directed verdicts against CTS, although on grounds other than those which the trial court based its decision.

The Court of Appeals held that in order for CTS to establish that Cornwell's conduct constituted attempted monopolization, it had to prove:

> "Two additional elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success (Swift & Co. v. United States (1905) 196 U.S. 375).
>
> "We do not reach the second element because we have concluded that the evidence produced, together with the conclusory statements of the offer of proof, were inadequate to present an issue for the jury in respect of the first element even after we have indulged the full spectrum of intendments in CTS's favor." (App. A, p. 12a.)[2]

CTS petitioned for rehearing and suggested that a rehearing be granted in banc with regard to the Court of Appeals' determination that CTS had not proffered sufficient facts from which a jury could find that Cornwell had attempted to monopolize a part of trade or commerce contrary to Section 2 of the Sherman Act (App. C). On August 31, 1971, the Court of Appeals entered its Order modifying its Opinion by striking a significant footnote, denied the petition for rehearing

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[2]As is hereinafter shown, the Court of Appeals should have reached the second "element" and in effect did so because the requisite intent was clearly shown.

and rejected the suggestion for rehearing in banc (App. B).[3]

The Opinion of the Court of Appeals, as modified, concluded that with regard to the counterclaims that were being remanded for trial, CTS, at retrial should be given an opportunity to establish, *inter alia,* (1) that Cornwell violated Section 2(a) of the Robinson-Patman Act by engaging in unlawful discriminatory pricing and that from what CTS offered to prove (sales below cost) "predatory intent can be inferred". (App. A, pp. 8a-9a); (2) that Cornwell had entered into exclusive dealing contracts on a scale which had an anticompetitive impact and effect (App. A, pp. 9a-10a); and (3) that Cornwell had terminated CTS as its distributor because of its refusal to go along with an anticompetitive exclusive dealing and full line forcing scheme in violation of Section 1 of the Sherman Act (App. A, pp. 10a-11a).

At trial CTS had also offered and/or introduced proof, that:

(a) Cornwell's refusal to honor its contractual agreement to repurchase CTS's inventory upon the termination of the distributorship arrangement was anticompetitively motivated by a desire to tie up CTS's capital and shelf space. [See R.T. 257-262, 2581-2582; C.T. 1434.];

(b) Cornwell declared defaults in the notes of certain of the CTS dealer customers and cancelled their in-

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[3]The footnote which was stricken read as follows:

"1. While the principle of Lessig v. Tidewater Oil (9th Cir. 1964) 327 F.2d 469 remains the law of this circuit, its continuing vitality has been questioned. See Walker Process Equip. v. Food Machinery & Chem. Corp. (1965) 382 U.S. 172, at 177-78. See also American Bar Association handbook, 'Antitrust Developments—1958-1968,' at 30."

ventory insurance to deprive CTS of its customers or to put financial pressure on it to refinance those dealers. (See numerous record references cited on pp. 13-14 of "Opening Brief on Behalf of Appellant".);

(c) Cornwell made offers of employment at relatively high wages to CTS employees, not intending to give them employment but rather to cause them to make increased wage demands on CTS [C.T. 434, 145; R.T. 2579]; and

(d) Cornwell granted its own dealer customers exclusive protected territories for the purpose of insulating them from intra-brand competition so they could concentrate their competitive fire on CTS's customers [R.T. 2566-2568, 1841-1855, 1877-1979; Exs. CR and CW-1 through CW-46, incl.].[4] (See App. C, pp. 3c-5c.)

Neither in its Opinion or in its Order denying rehearing and modifying its Opinion did the Court of Appeals meaningfully explain its reasoning with regard to how it reconciled allowing CTS to proceed to trial with regard to the serious violations of Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 2(a) of the Robinson-Patman Act, including the right to prove facts from which the jury could infer "predatory intent", with its refusal to allow trial with regard to

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[4]The Court of Appeals, in reversing and remanding, recognized that it should not view CTS's offers of proof "hypertechnically . . . because we recognize that much of their disorderliness is attributed to the unusual procedural directions that caused them to be produced". (App. A, p. 5a.) CTS urged at trial and on appeal that the trial court acted arbitrarily in denying discovery to it until CTS had proved to the trial court's satisfaction that the violations charged had occurred and refused to allow it to subpena Cornwell's records for use at trial (App. C, p. 5c, n.2).

attempted monopolization.[5] It decided as a matter of law that the facts under the provable violations could not make out a *prima facie* Section 2 case.

Reasons for Granting the Writ.

In the more than 80 years since the passage of the Sherman Act: "The Supreme Court has never discussed the elements of the offense of attempt to monopolize in any substantial degree of detail and lower federal court decisions reflect considerable difference of opinion." Oppenheim and Weston, *Federal Antitrust Laws,* (3d Ed. 1968), p. 307.

The illusive and troubling definition of attempted monopolization has also been the subject of considerable controversy among antitrust lawyers and legal scholars. See Turner, D. F., *Antitrust Policy and the Cellophane Case,* 70 Harv.L.Rev. 281 (1956); Hale and Hale, *Market Power Size and Shape Under the Sherman Act,* Ch. 9 (1958); Johnston, *Monopolize or Attempt to Monopolize,* 3 A.B.A. Antitrust Section Rep. 72 (1953); *Attempt to Monopolize: Its Elements and Their Definition,* 27 Geo. Wash. L. Rev. 227 (1958); *Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market,* 42 N.Y.U. L.Rev. 110 (1967); Blecher,

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[5]The Court of Appeals never dealt with the issue raised in Appellant's Opening Brief, and re-raised in the petition for rehearing, that *arguendo,* even if the trial court was correct with regard to CTS's proffer of proof, the arbitrary denial by the trial court in refusing to allow CTS to enforce the single trial *subpena duces tecum* served on Cornwell presented reversible error. Prior to trial, CTS served on Cornwell a comprehensive trial *subpena duces tecum* [Ex. T] designed to bring forth the documentary evidence from which CTS could, *inter alia,* prove Cornwell's violation of Section 2 of the Sherman Act, including its intent and market power and which subpena would also serve to obviate the errors in the trial court's denial of discovery which CTS assigned as a separate basis of error on appeal.

Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market" 38 Geo. Wash. L. Rev. 215 (1969); *Attempt to Monopolize—A Concept in Search of Analysis,* 34 A.B.A. Antitrust Law Journal 165; Scott and Rockefeller, *Antitrust and Trade Regulation Today: 1967,* a BNA Book, 1967, pp. 1-3.

This instant case presents issues that are vital to both private and federal enforcement of the antitrust laws and in particular Section 2 of the Sherman Act's proscription of attempts to monopolize. That section is of vital importance because, except for the specific limited prohibitions of the Robinson-Patman Act relating to price discrimination, and Section 3 of the Clayton Act's banning of certain exclusive dealing arrangements, Section 2 of the Sherman Act is the only antitrust law which provides a private or governmental damage remedy for single trader or unilateral predatory anticompetitive activities.[6]

This Court stated in *Times-Picayune Publishing Company v. U.S.,* 345 U.S. 594, 626 (1953) "That either a specific intent to destroy competition *or* build a monopoly is essential to the guilt for the mere attempt now charged". (emphasis added.) The Second Circuit Court of Appeals held in *United States v. Consolidated Laundries Corp.,* 291 F.2d 563 (2nd Cir. 1951) that there was no need to show market share or the ability to gain monopoly power where the charge was a conspiracy to monopolize under Section 2 of the Sherman

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[6]Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is an administrative remedy which does not provide for a private right of action or for the awarding of damages to the injured party.

Act. But see *United States v. Chas. Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965).

The Ninth Circuit Court of Appeals in the landmark case of *Lessig v. Tidewater Oil Company*, 327 F.2d 459, at 474-475 (1964) held:

> "We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.[68]"
>
> "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' United States v. E. I. DuPont & Co., 351 U.S. 377, 395 n. 23, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products."
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> * * *

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[68]Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 279, 49 L. Ed. 518 (1905) ("* * * when that intent and the *consequent* dangerous probability exist * * *." (Emphasis added.)) See also United States v. Griffith, 334 U.S. 100, 105, 68 S. Ct. 941, 92 L. Ed. 1236 (1948); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 667 (9th Cir. 1963)." [Footnote by the court.]

Lessig has been recently followed by the Ninth Circuit in *Industrial Building Materials v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970).[7] In the instant case, however, the Court was of the view that CTS had not alleged facts from which a jury could have found an intent "to monopolize" and apparently found CTS's allegations and proffer of proof that Cornwell set out to destroy CTS, by activities which are generally regarded as predatory, insufficient to establish the necessary intent. In effect, the Court of Appeals has held that unilateral or single trader activities, no matter how predatory, do not give rise to a claim under and do not violate Section 2 of the Sherman Act unless those activities bring the party charged dangerously close to gaining monopoly power.[8] We state here the same rhetorical question which was presented to the Court of Appeals in the petition for rehearing, namely, whether it is legally possible for the smallest American automobile manufacturer to engage in what are generally regarded as improper predatory anticompetitive tactics having no legitimate economic justification aimed at and injuring or destroying a foreign exporting manufacturer of automobiles without being accountable to the injured party. Obviously such a company could not by its conduct achieve or come dangerously close to achieving monopoly power; yet the decision of the Ninth Circuit Court of Appeals, even when combined with the

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[7]Compare, however, *Case-Swayne Company, Inc. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966) reversed on other grounds 389 U.S. 384 (1967).

[8]This seems inconceivable with the ruling of the Court of Appeals that "the record before us does not permit us to sustain removal of the relevant market issue from the jury" (App. A, p. 7a).

rule in *Lessig*, effectively emasculates Section 2's ban against attempted monopolization.[9]

Petitioner believes that there is probably no more significant open question in antitrust enforcement today than the definition of attempted monopolization. That question encompasses both the question of what "specific intent" is necessary and whether coming "dangerously close" to monopolization is essential to establishing a violation.

This Court, in the very case in which it announced the concept of "relevant market" as part of the necessary proof of "monopolization," indicated that the concept was not relevant in an attempt to monopolize case as opposed to a monopolization case. See *United States v. Dupont*, 351 U.S. 377, 395 fn. 23 (1956). This difference has apparently been clouded by the dictum of this Court in *Walker Process Equipment v. Food Machinery*, 382 U.S. 172 (1965) which Oppenheim and Weston, *Federal Antitrust Laws, supra* at 309 was not an attempt to monopolize case.[10]

The error of the Court of Appeals is manifest from the fact that it allows CTS to prove on retrial the "predatory intent" under Section 2(a) of the Robinson-

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[9]Prior to striking the original footnote in its Opinion, the Court of Appeals apparently felt somewhat urged on to abandon *Lessig* because of this Court's *dictum* in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965).

[10]The United States Department of Justice, appearing as *amicus curiae* supporting the antitrust counterclaim in that case, argued that there was no need to define a relevant market in an attempt to monopolize. Oppenheim and Weston, *Federal Antitrust Laws*, 3d ed. p. 309. This was at least the second time that the Antitrust Division of the Department of Justice took this position. See the Jurisdictional Statement filed in this Court in *United States v. Singer Mfg. Co.* (No. 438, Oct. Term 1962) p. 22, decided on other grounds, 374 U.S. 174 (1963).

Patman Act. Hence, it viewed monopoly power as a *sine qua non* of attempted monopolization.[11]

As in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136, certiorari should be granted because the ruling by the Court of Appeals threatens "the effectiveness of private action as a vital means of enforcing the antitrust policy of the United States". Section 2 is a particularly vital part of antitrust enforcement because conduct may be an unlawful attempt to monopolize under Section 2 even though not an unreasonable restraint under Section 1. *United States v. Columbia Steel*, 334 U.S. 495 at 531-532 (1948). In both governmental and private actions, Section 2 is therefore essential and the resolution of this issue here presented would clarify the clearly murky waters (no pun intended).

Finally, though CTS contended in its brief filed with the Court of Appeals and again in its petition for rehearing that it should not be precluded on retrial from proving the "specific intent" because the trial court had arbitrarily refused to enforce CTS's one trial *subpena duces tecum* addressed to Cornwell, the Court never passed on that issue. It is elementary that fairness, if not due process, requires that a party to litigation be entitled to subpena from its adversary the documents necessary to establish its legal claim. Rules 45 and 61 F.R.C.P., see Moore's *Federal Practice*, Vol. 5A, pp.

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[11]The Court of Appeals in effect decided the second issue which it said it was not reaching. It would appear from the fact that the Court of Appeals struck footnote 1 from its original opinion, that what troubled the Court was the "continuing vitality" of the *Lessig* doctrine, which ambiguity it sought to eliminate from its Opinion by striking footnote 1 without, however, resolving this basic issue.

1716-1717.[12] Here the Court of Appeals never addressed itself to this issue which required reversal and in effect upheld, *sub silento,* the trial court's arbitrary refusal to enforce its subpena power, though no motion to quash was made. This deprived CTS a fair opportunity to prove the attempted monopolization even if we assume, *arguendo,* that the Court of Appeals was correct in its legal analysis; this error alone requires summary reversal. See Rule 45 F.R.C.P. See Stern and Gressman, *Supreme Court Practice,* 4 ed., pp. 220-223.

The vice in the refusal to enforce the *subpena duces tecum* is all the more apparent because, as was urged in the Court of Appeals, "on this appeal, CTS also contends that the nature of certain of the pretrial proceedings including the denial of discovery and the right to subpoena documents at trial in and of themselves warrant reversal of this case". (Opening Brief on Behalf of Appellant, p. 4, Fn. 2.) Similarly, the petition for rehearing urged that the issue concerning the subpena be decided. (App. C, p. 5c, n.2.)

In view of CTS's being allowed to go to trial on the other issues, it is necessary to point out that the Section 2 attempt to monopolize case is not gilding the lily. Obviously, the measure of damages and the proof

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[12]In this case, no motion to quash was made at trial. The trial court simply failed to enforce the *subpena duces tecum* [Ex. T] despite CTS's plea. The documents which would have been produced would have assuredly proved additional support for CTS's attempt to monopolize case. (See App. C, p. 5c, n.2.) No case has been found where a court *sua sponte* refused to enforce a trial *subpena duces tecum* served on a party; See *Westinghouse Electric Corp. v. City of Burlington, Vermont,* 351 F.2d 762 (D.C. Cir., 1965); *Horizons Titanium Corp. v. Norton Company,* 290 F.2d 451 (1st Cir., 1961); *Goodman v. United States,* 369 F.2d 166 (9th Cir. 1966).

which can be introduced may be adversely affected by the nature of the claims and therefore CTS's right to a determination of this issue on the merits is a matter of substantial significance.

In view of the confusion in the Federal courts with regard to the issue of attempted monopolization and the divergent views expressed by other authorities, it is important that this Court grant the prayed for petition for the writ of certiorari and define the elements of attempted monopolization. Such a determination will not only serve the interests of justice in this case, but we respectfully submit will save many litigants and the courts many days in other cases. If petitioner is correct with regard to its interpretation of the law, then under the *Lessig* doctrine much more limited proof will suffice to establish attempted monopolization and there will be avoided, in many cases, the long and burdensome task of proving that a defendant has come dangerously close to achieving monopoly power.

Conclusion.

The petition for a writ of certiorari should be granted.

Dated: October 28, 1971.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Cornwell Quality Tools Co., *Plaintiff-Appellant*, v. C.T.S. COMPANY, INC. *Defendant-Appellee*. No. 24,914.

Cornwell Quality Tools Co., *Plaintiff-Appellee*, v. C.T.S. Company, Inc., *Defendant-Appellant*. No. 24,969.

[June 24, 1971]

Appeal From the United States District Court for the Central District Court of California.

Before: MERRILL, ELY, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Cornwell Quality Tools Co. ("Cornwell") and C.T.S. Company, Inc. ("CTS") filed cross-appeals from the adverse portions of the district court's judgment entered after each party had moved successfully against the other for directed verdicts.

The case breaks into four parts: (1) Cornwell's claim against CTS to recover the purchase price of merchandise it sold to CTS, its former distributor, and CTS's set-off and counterclaims against Cornwell charging breach of a claimed oral contract to repurchase the inventory upon termination of CTS's distributorship; (2) CTS's counterclaims against Cornwell for treble damages based on alleged violations of the federal antitrust laws; (3) Cornwell's counterclaim

against CTS charging a violation of the federal anti-trust laws; and (4) Cornwell's contention that the district court erred in taxing costs.

Cornwell, an Ohio manufacturer of mechanics' hand tools, entered an agreement with CTS in 1956 whereby CTS became Cornwell's sole distributor in California and Nevada. CTS entered contracts with dealers to whom were assigned specified territories. The dealers, sometimes called "wagon men," made sales from trucks to the ultimate consumers, usually mechanics. That mode of distribution was used by three manufacturers operating in California and Nevada: Cornwell, Snap-On Tools Corporation of Kenosha, Wisconsin ("Snap-On"), and Mac Tools Corporation of Sabina, Ohio ("Mac").

In 1964, differences arose between CTS and Cornwell, the responsibility for which was hotly contested. According to Cornwell, the relationship deteriorated because CTS made a distribution deal with its competitor Mac, intending to obtain all of Mac's and Cornwell's dealers and to restrict competition in Nevada and California to itself and Snap-On. CTS entered a course of conduct whereby Cornwell would lose its distribution system in CTS's territory unless Cornwell acquiesced in CTS's selling both Cornwell's tools and Mac's. Cornwell refused to yield and, instead, set up its own warehouse in California and began selling directly to dealers. CTS's version is very different. CTS claims that Cornwell had decided in 1963 to eliminate distributors and to undertake direct sales to dealers. Cornwell pursued its plan to squeeze out CTS. To protect itself from Cornwell's machinations, CTS made the agreement with Mac to have at least one line to sell.

In July 1964, CTS took on the Mac line. Cornwell immediately terminated CTS's distributorship, and shortly thereafter Cornwell opened its branch in California. After CTS switched allegiance and before Cornwell filed suit, both parties vigorously sought to secure the dealers and customers of the other. The antitrust claims stem from the contentions of each that the other's efforts exceeded the bounds of lawful competition.

Cornwell started the litigation by filing a complaint to recover $12,110.72, the unpaid balance of the account for merchandise sold to CTS. The action expanded with the cross-filing of counterclaims. After more than four years of discovery and pretrial proceedings, the cause came to trial before a jury.

CTS stipulated to the amount of Cornwell's claim for the price of merchandise, but it contended that it was entitled to 22,361.29 damages for Cornwell's breach of an alleged oral contract to repurchase the inventory in the event of termination of the distributorship. Cornwell admitted that it did not repurchase CTS's inventory when the distributorship was terminated, but it contended that there had been no agreement to repurchase it.

The contract issues were tried first, excluding the damages issue. Evidence adduced on both sides indicated that the parties had entered an oral agreement that Cornwell would repurchase the inventory upon termination, but there were conflicting versions of the terms of the agreement. Cornwell's motion for a directed verdict was based on the grounds that no oral agreement was enforceable because: (1) California's Commercial Code § 2201 requires that a contract for the sale of goods for the price of $500 or more cannot be enforced unless there is a writing complying with

the statute, and (2) California's Commercial Code § 2202 excluded proof of the oral agreement because it contradicted the terms of written purchase orders for the tools. The district court did not direct the verdict on either of those grounds. The court decided to take the contract issues from the jury when, shortly before the jury was to be instructed, the court learned that one of the jurors was sick, and Cornwell refused to stipulate to have the questions resolved by eleven jurors. The court explained that it was directing the verdict because it appeared to be the most expeditious way to bring the entire case before the Court of Appeals.

Cornwell recognizes that the direction of the verdict on the contract issues cannot be upheld unless we can say, as a matter of law, that recovery on the claimed oral contract was foreclosed by the statute of frauds or by the parol evidence rule. The statements of those rules in the Commercial Code are irrelevant because the transactions occurred before the Commercial Code became effective, and the Code does not have retrospective application. (Cal. Com. Code § 10101.)

The parol evidence rule did not foreclose proof of the oral agreement because there was no evidence that the written purchase orders were intended to be final embodiments of the parties' agreements. The rule is inapplicable to unintegrated writings. (*Royal Industries v. St. Regis Paper Co.* (9th Cir. 1969) 420 F.2d 449; *Masterson v. Sine* (1968) 68 Cal. 2d 222.)

The statute of frauds did not, as a matter of law, bar enforcement of the oral agreement. The evidence is susceptible to the interpretation that part performance of the oral agreement took the agreement out of the statute. (Cal. Civ. Code § 1724; *Monarco v. LoGreco* (1950) 35 Cal. 2d 62.)

After the contract issues had been presented, CTS commenced trial of its antitrust counterclaims in accordance with the order of proof adopted in pretrial proceedings. After a week of trial on CTS's counterclaims, the district court halted further proof, and, over the objections of both parties, ordered CTS to suspend its case and directed Cornwell to begin its case-in-chief on its antitrust claims against CTS. Following the conclusion of Cornwell's testimony, the court directed the parties to finish their respective cases on offers of proof. Both parties made written and oral offers of proof. CTS never rested its antitrust case, and rebuttal was not made by either party. At the conclusion of the respective offers of proof, following argument, the court directed verdicts against both parties.

The offers of proof are lengthy. They are a curious compound of documents, depositions, narrations, legal argument, and conclusions. We do not view these offers hypertechnically, however, because we recognize that much of their disorderliness is attributable to the unusual procedural directions that caused them to be produced.

We turn to CTS's antitrust claims against Cornwell.

CTS made five separable antitrust claims against Cornwell, alleging that Cornwell had violated: (1) section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)) by offering discounts in California and Nevada in an attempt to drive CTS out of business; (2) section 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)) by paying unearned commissions to dealers in California and Nevada; (3) section 3 of the Clayton Act (15 U.S.C. §14) and section 1 of the Sherman Act (15 U.S.C. § 1) by forcing its dealers

to enter into exclusive dealing contracts; (4) section 1 of the Sherman Act by terminating CTS for refusing to enter into an illegal exclusive dealing arrangement with it; (5) section 2 of the Sherman Act (15 U.S.C. § 2) by attempting to monopolize the sale of tools to mechanics in the California and Nevada area.

CTS's threshold problem in proving a prima facie case for any of its antitrust claims was proof to a well-defined relevant market upon which the challenged anti-competitive actions would have had a substantial impact.

Cornwell argues vigorously that CTS's evidence and its offers of proof were inadequate to sustain CTS's prima facie burden on this issue. But it argues almost as vigorously the opposite side of the same issue when it seeks to overturn the directed verdict against it on its own antitrust claim against CTS. We conclude that there was enough evidence presented and promised by both sides on the issue to foreclose the direction of the verdict on the relevant market score.

There was evidence adduced and offered that professional quality hand tools and related equipment sold by mobile dealers (wagon men) to ultimate consumers constitute a separate product market or line of commerce under the Sherman, Clayton, and Robinson-Patman Acts, that such hand tools are so distinctive that they cannot be compared with other hand tools, and that there are only three manufacturers which market professional quality hand tools in California and Nevada through mobile dealers, namely, Snap-On, Mac, and Cornwell. CTS was ready to prove that these three companies did not face substantial competition from other tool manufacturers in this market for three rea-

sons: First, the tools of these companies are of markedly better quality, particularly in terms of durability, than similar tools manufactured by other companies. Hence, for the professional mechanic, they are not interchangeable with other tools. Second, only these three companies make "specialty tools" for the repair of late model automobiles. Tnirty to forty percent of the tools they manufacture and sell are specialty tools needed by professional mechanics and available nowhere else. Third, these three companies sell exclusively through roving dealers, 85 percent of whom are franchised by one of the three companies. Because the marketing mode is convenient and because the dealers often possess expertise upon which consumers tend to rely, professional mechanics seldom purchase tools from any source other than Mac, Snap-On, or Cornwell dealers in California and Nevada.

Upon CTS's full production of the evidence, it may well be, as Cornwell sometimes argues, that dealers with fixed locations actively compete with Mac, Snap On, and Cornwell for the professional tool trade, that the mode of retailing is not a meaningful basis for distinguishing those three vendors from other tool distributors, and that the share of the properly defined relevant market held by Cornwell, Mac, and Snap-On is so insubstantial as to be beneath the notice of the federal antitrust laws. But we cannot say from the evidence that CTS produced, together with the evidence promised, that a jury could not have found that the market picture was as CTS painted it, or that the jury would have had to find that Cornwell's view of the market was right. The record before us does not permit us to sustain the removal of the relevant market issue from the jury.

In discussing the antitrust claims of CTS and of Cornwell, we view the evidence adduced and promised with the same intendments favorable to the proponent against whom the verdict was directed as those mentioned in connection with the relevant market issue.

CTS claimed that Cornwell violated section 2(a) of the Robinson-Patman Act by engaging in discriminatory pricing. Under section 2(a) of the Act, sellers cannot sell like goods to different buyers at different prices if the pricing tends to injure competition in either the buyers' or the sellers' market, unless the price differentials are justified by factors recognized in the Act.

CTS sought to prove that Cornwell sold its tools in California and Nevada for less than it did in other parts of the country. The district court foreclosed discovery and attempted proof of that claim, ruling that price differentials outside of California and Nevada were irrelevant. The ruling was erroneous (*e.g., F.T.C. v. Anheuser-Busch, Inc.* (1960) 363 U.S. 536). Upon remand, the district court will allow CTS an opportunity to establish price differentials between Cornwell's buyers outside of Nevada and California and those within that area.

It is unnecessary to detail all evidence introduced or proffered in respect of CTS's section 2(a) claim. A brief sketch will suffice. After termination of CTS's distributorship, Cornwell sold tools to some of its California and Nevada dealers at substantially greater discounts than it gave to others in the same states. That evidence was prima facie sufficient to establish the price discrimination element of its section 2(a) claim. (*F.T.C. v. Anheuser-Busch, supra.*) To meet the anti-competitive-effect requirement, CTS offered to prove

that Cornwell sold tools to selected California and Nevada dealers below cost. If CTS makes good its offer, predatory intent can be inferred. From proof of predatory intent, the jury could infer anticompetitive effect. (*Utah Pie v. Continental Baking Co.* (1967) 386 U.S. 685.) It follows that CTS's evidence on its section 2(a) claim was enough to avoid a directed verdict.

Section 2(c) of the Robinson-Patman Act makes it unlawful for any person to pay brokerage commissions on the sale of goods to the purchaser, or to anyone acting as the agent of, or on behalf of the purchaser, unless the commissions were earned for services rendered in effecting the sale. CTS offered to prove that Cornwell paid commissions to certain dealers on the sale of products to neighboring dealers, although the former had nothing to do with the sale. CTS says the scheme was to reward dealers for not competing with each other. There is no violation of section 2(c) unless the person receiving the unearned commissions was under the control of purchasers or acting on behalf of purchasers. CTS offered no proof that the dealers who received commissions fell in either category. The district court properly granted a directed verdict upon CTS's section 2(c) claim.[1]

CTS next claimed that Cornwell's exclusive dealing contracts with its dealers violated section 3 of the Clayton Act. The existence of the exclusive dealing contracts was not in dispute.[2] The section 3 issue is

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[1]We do not decide whether or not the challenged conduct was, or could have been, a violation of the Sherman Act.

[2]The district court excluded the offered contracts on the ground that they were immaterial. Cornwell tacitly recognizes that the exclusion was erroneous.

whether or not CTS offered enough proof prima facie to establish the requisite anticompetitive impact on the relevant market. CTS offered to prove that 10 to 15 percent of the California and Nevada dealers had entered into such contracts with Cornwell.[3] Although the figure cannot compel a finding of substantiality and, upon full proof, the impact may be insignificant, we cannot say that the evidence was so flimsy as to permit withdrawal of the issue from the jury. In *Standard Oil of California v. United States* (1949) 337 U.S. 293, the Supreme Court held that the locking up of 6.7 percent of the retail gasoline market permitted an inference of substantial impact. It may be, as Cornwell argues, that the differences between the tool and gasoline markets are such that a 10 percent share of the former is of much less significance than a 6.7 percent share of the latter, but that is an issue that cannot be decided as a matter of law on this record.

CTS also claimed that Cornwell terminated its distributorship because CTS refused to enter a nationwide exclusive dealing arrangement with Cornwell whereby distributors were required to deal solely with Cornwell and were required to impose similar restrictions upon their dealers. CTS did not offer a portrait of the national market for mechanics' tools, and the jury could not have found the nationwide aspects of the arrange-

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[3]Cornwell objected to the introduction of contracts entered into subsequent to January 18, 1965, the date on which CTS filed its first counter-claim. Regardless of the merits of that contention, which are discussed *infra*, it does not appear from this record that so many of the contracts complained of date from the period subsequent to January 18 as to destroy CTS's argument on anticompetitive effect.

ments to be anticompetitive.[4] However, CTS did offer to prove that had it entered the exclusive dealing arrangement with Cornwell, enough dealers in California and Nevada would have been locked up to have permitted a jury to infer that the arrangement might have had substantial impact on the relevant market. That evidence was enough to prevent taking the issue of the legality of the rejected contract from the jury. Prima facie proof that the rejected contract was violative of the antitrust laws coupled with similar proof that Cornwell terminated the distributorship because CTS refused to enter the illegal contract would make out its prima facie claim that Cornwell violated section 1 of the Sherman Act. (*Osborn v. Sinclair Refining Co.* (4th Cir. 1960) 286 F.2d 832, *cert. denied* (1960) 366 U.S. 963.) CTS offered no direct evidence to prove that Cornwell's motivation in terminating the distributorship was CTS's refusal to enter the exclusive dealing arrangement, but it did offer to prove that Cornwell had unsuccessfully exerted pressure on CTS to sign the contract only a month before termination. A jury could have inferred a cause-and-effect relationship between these events. We are mindful of the Supreme Court's admonition that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles." (*Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, 473.)

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[4]CTS complains that it did not do so because the court's limitations on discovery prevented its access to information about the national aspects of Cornwell's exclusive dealing arrangements. But there is no suggestion that the court's ruling prevented CTS from gathering information on the competitive situation in the national market.

CTS's final antitrust claim is that Cornwell attempted to gain monopolistic control over the sale of tools in California and Nevada in violation of section 2 of the Sherman Act. CTS offered to prove that Cornwell tried to implement its plan to monopolize by driving CTS out of business. To convert Cornwell's conduct from vigorous competition into a separate Sherman Act offense, CTS had to prove two additional elements: (1) Cornwell had the specific intent to monopolize, and (2) it had sufficient market power to come dangerously close to success. (*Swift & Co. v. United States* (1905) 196 U.S. 375).

We do not reach the second element because we have concluded that the evidence produced, together with the conclusory statements of the offer of proof, were inadequate to present an issue for the jury in respect of the first element even after we have indulged the full spectrum of intendments in CTS's favor.

With respect to the antitrust claims that are being remanded for trial, we discuss briefly the dispute concerning the relevance of evidence concerning events that occurred after January 18, 1965, the date upon which CTS filed its first counterclaim. Cornwell has consistently objected to the introduction of evidence as to events that occurred after that date; CTS has argued that it may present evidence of events occurring right up to trial. Neither party is entirely correct. CTS cannot present evidence of new antitrust violations occurring after the filing of its counterclaim in an effort to have these violations serve as the basis of recovery, nor can it introduce evidence as to damages suffered after the date of filing due to activities constituting part of a continuing violation of the antitrust laws

that occur subsequent to the filing date. (*Flintkote Co. v. Lysfjord* (1957) 246 F.2d 368, 394-97.) The proper cut-off date, however, is March 26, 1965, the date on which CTS filed its final counterclaims in response to Cornwell's amended complaint. Moreover, if it proves liability, CTS has the right to recover compensation for all past and future damages suffered as a result of Cornwell's alleged violations. Evidence as to actual damages suffered as a result of actions occurring prior to the filing is admissible, even if the damages themselves arose after the counterclaims were filed. Further, evidence of any activity of Cornwell's that may reflect upon its market position or the intentions of its management at the time of the alleged violations is admissible regardless of when it occurred.

We now take up Cornwell's antitrust claims against CTS. Cornwell contends that CTS attempted to monopolize the mechanics' tool market in violation of section 2 of the Sherman Act and that CTS conspired with Mac to achieve that design, likewise in violation of section 2. Cornwell's claims are a mirror image of the CTS claim last discussed, and it suffers similar flaws. The only evidence directed to the specific intent issue is proof that CTS intended to carry both Mac and Cornwell tools. We do not think that evidence under all of the circumstances was enough to carry Cornwell's section 2 claim to the jury. Cornwell makes a great deal of evidence from depositions that tends to indicate that CTS and Mac had conspired to set up exclusive territories for the Mac dealers, a per se violation of section 1 of the Sherman Act. (*United States v. Arnold Schwin & Co.* (1967) 388 U.S. 365.) However, since Cornwell never offered to prove that this

practice resulted in, or was likely to result in, the exclusion of any competitors from the relevant market, CTS's intent to engage in this practice cannot serve as the specific intent to monopolize required for a section 2 violation.

The remaining point is Cornwell's complaint that the district court erred in taxing and apportioning costs. Cornwell requested no relief from the order in the district court. The district court has broad discretion in apportioning and taxing costs where, as here, neither party completely prevailed. No abuse of that discretion has been shown in this case.

The judgment is reversed, and the cause is remanded for further proceedings consistent with the views herein expressed. Each party shall bear its own costs on appeal.

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

The Cornwell Quality Tools Company, A corporation, Appellee, v. C.T.S. Company, Inc., A corporation, Appellant. No. 24914.

Filed Aug. 31, 1971.

Before: MERRILL, ELY, and HUFSTEDLER, Circuit Judges

The court on its own motion strikes footnote one (p. 5 of the slip opinion) in its entirety and accordingly renumbers the remaining footnotes.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing. and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C.

Petition for Rehearing and Suggestion for Rehearing in Banc.

In the United States Court of Appeals for the Ninth Circuit.

Cornwell Quality Tools Co., Plaintiff-Appellee, vs. C.T.S. Company, Inc., Defendant-Appellant. No. 24969.

Filed July 30, 1971.

Upon Appeal From The United States District Court for the Central District of California (No. 64-1456-HW).

PRELIMINARY STATEMENT

This court filed its Opinion in appeal numbers 24969 (and 24914) on June 24, 1971 and on July 15, 1971 entered its order granting CTS to and until July 30, 1971 within which to file a petition for rehearing in 24969. This Petition for Rehearing and Suggestion for Rehearing in Banc is filed pursuant to Rules 40 and 35 of F.R.A.P.

The within Petition for Rehearing is limited to the single question of whether this court erroneously concluded that the District Court had properly directed a verdict against CTS on its claim against Cornwell for attempted monopolization under Section 2 of the Sherman Act. This court's decision was based on its belief "that the evidence produced, together with the conclusionary statements of the offer of proof, were inadequate to present an issue for the jury in respect of the first element [whether Cornwell had the requisite specific intent] even after we have indulged the full spectrum of intendments in CTS's favor" [Opinion, p. 9].

For the reason hereinafter set forth, we believe there was more than ample evidence in the record and offered to establish the element of specific intent as that element of attempted monopolization has been defined by the courts. Because of the importance of this question and the closely related question of the vitality of *Lessig v. Tidewater Oil,* 327 F.2d 459 (9th Cir.) to antitrust enforcement, we respectfully suggest that rehearing be granted *in banc* if the court has doubt as to the appropriateness of modifying its opinion reinstating the attempt to monopolization count.

ARGUMENT

A. *The Issue of Specific Intent*

As the Supreme Court noted in *Times-Picayune Publishing Company v. United States,* 343 U.S. 594, 626 (1953) either "a specific intent to destroy competition or build monopoly is essential to the guilt for the mere attempt now charged". The requisite specific intent may be satisfied by action designed to drive a competitor out of business. See *United States v. Consolidated Laundries Corp.,* 291 F.2d 563 (2nd Cir. 1961). As this court noted in *Lessig v. Tidewater,* at p. 474:

> "We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective."

In *Swift v. United States,* 196 U.S. 375, 396 (1905) which was the grandfather of the specific intent concept and the foundation of *Lessig,* the Supreme Court also noted that the dangerous probability was a consequence of the formation of the specific intent.

In this case we need not embark upon an academic discussion of whether inferences drawn from circumstantial evidence alone may give rise here to the proof of the requisite specific intent. We turn to this court's Opinion and the record of the precise evidence offered and/or received to establish that we do not here deal in mere conclusion and speculation.[1]

This court, in its Opinion, has already concluded that CTS should be given an opportunity at trial to establish:

1. That Cornwell violated Section 2(a) of the Robinson-Patman Act by engaging in unlawful discriminatory pricing and that from what CTS offered to prove "predatory intent can be inferred" [Opinion, p. 6-7].

2. That Cornwell entered into exclusive dealing contracts on a scale which had an anticompetitive impact [Opinion, p. 7-8].

3. That Cornwell terminated CTS as its distributor because of its refusal to go along with an exclusive

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[1]Reference is made to pages 39-41 of CTS's "Opening Brief on Behalf of Appellant" for summarization of what facts CTS relied upon to establish the attempt to monopolize.

dealing and full line forcing scheme in violation of Section 1 of the Sherman Act [Opinion, p. 8-9].

In addition, there was already offered and/or received in evidence proof that:

(a) Cornwell's refusal to honor its contractual agreement to repurchase CTS's inventory upon the termination of the distributorship arrangement was motivated by a desire to tie up CTS's capital and shelf space. See R.T. 257-262, 2581-2582; C.T. 1434.

(b) Cornwell declared defaults in the notes of certain of the CTS dealer customers and cancelled their inventory insurance; CTS was prepared to prove and had already offered in evidence documentary proof that the conduct was legally unjustified and designed to deprive CTS of its customers as well as to put financial pressure on it to refinance those dealers. [See numerous record references cited on pp. 13-14 of "Opening Brief on Behalf of Appellant".]

(c) CTS was prepared to prove that Cornwell made offers of employment at relatively high wages to CTS employees, not intending to give them employment but rather to cause them to make increased wage demands on CTS [C.T. 434, 145; R.T. 2579].

(d) In addition, CTS was prepared to prove that Cornwell granted its dealers protected territories for the purpose of insulating them from intra-brand competition so they could concentrate their competitive fire on CTS's customers [R.T. 2566-2568, 1841-1855, 1877-1979; Exhibits CR and CW-1 through CW-46, incl.].

C.T.S. was well on its way to proving by documentary evidence (which had been received in evidence) that Cornwell's conduct was part of a deliberate plan. [See Exhibits BN, CD, CE, CF; R.T. 1547-1550, 1830-1837.][2]

It is and was urged by CTS that from all of these facts there was proved and could be inferred an intention to drive CTS out of the dealer business. It is respectfully submitted that, as CTS said in its Opening Brief, "The rhetorical question becomes, could a jury, if these facts were proved, find an attempt to monopolize in violation of Section 2 of the Sherman Act. Alternatively stated, the question is were there facts from which a jury could determine that Cornwell formed a specific intent to and committed overt acts in furtherance of a plan to drive CTS out of business." (Opening Brief on Behalf of Appellant, p. 42.) CTS is at a loss (in view of the court's recognition of the mandate of *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962) that proof of intent is largely in the hands of alleged conspirators and hostile witnesses which thickens the plot) to know where it has failed. Summary disposition of this attempt to monopolize claim by directed verdict is no more ap-

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[2]While we think the issue need not be reached here, if CTS's proof is said to have failed with regard to the issue of specific intent, the trial court's refusal to enforce the subpena duces tecum (Exhibit T for identification) directed to Cornwell becomes reversible error since that subpena called for the production of documents from which the specific intent could have and would have been established (See Exhibit T for identification, and particularly paragraphs 24, 46, 50, 53, 60, 61 and 74 thereof). (R.T. 510-511, 2056, 581-596, 796-800, 503-504, 1738-1740.) The refusal to enforce the subpena becomes all the more prejudicial in light of the wholesale denial of discovery by the trial court and its failure to invoke Local Rule 9 granting CTS the benefit of formal pretrial disclosure and production.

propriate here than it was by trial by affidavit in *Poller*.

This court's holding (Opinion, p. 9) that CTS was required to prove that Cornwell had "specific intent to monopolize" and had "sufficient market power to come dangerously close to success" is to effectively reject the reasoning of *Lessig* to which lip-service is paid as "the law of this circuit" (Opinion, P. 5, f.n. 1).[3] if the specific intent required is a specific intent to gain monopoly power in a relevant market in which the defendant has come dangerously close to success, then *Lessig* is dead! We come here not to bury *Lessig* but to praise it.

B. *The Relevant Market Issue.*

If this court holds, as we urge, *supra*, that the evidence (offered and received) of Cornwell's intention to drive CTS out of business, would establish the required specific intent, the relevant market question need not but, we submit, should be met.[4] In the interest of judicial economy and recognizing the protracted nature of this case and the fact that a substantial part of the re-trial of this case may be devoted to this unnecessary issue, we urge that the cloud cast on the *Lessig* doctrine by footnote 1 of this court's Opinion be removed. CTS, under *Lessig*, is not under a burden to establish a "clearly defined relevant market" in

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[3]*Lessig* has been recently reaffirmed by this circuit in an opinion in which the ink is hardly dry. See *Industrial Building Materials v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970).

[4]CTS was and is, in an abundance of caution, prepared to prove that the sale of professional quality mechanics' hand tools through the wagonmen method of distribution is, in the *duPont* sense, a relevant market [C.T. 1624, 1421-1426; C.T.S.'s Reply Brief, p. 19].

terms of the concept enunciated in *United States v. E. I. duPont DeNemours & Co.*, 351 U. S. 377.[5] If *Lessig* is now abandoned, then it follows that Congress has failed to enact any federal law to grant private[6] redress for *unilateral* predatory anticompetitive conduct occurring in interstate commerce unless such conduct rises dangerously close to the level of monpolization or constitutes an anticompetitive price discrimination or an anticompetitive exclusive dealing arrangement. Any competitor who is not dangerously close to achieving a monopoly position could feel free to use the full range of predatory conduct to drive a competitor out of business as long as he does not conspire with others or violate the specific prohibitions of the Robinson-Patman Act or Section 3 of the Clayton Act.

A hypothetical example best illustrates the point: Is it possible that in 1971 the Chrysler Corporation, free from antitrust liability because of the existence of the larger General Motors and Ford, could unilaterally set out to and succeed in driving Toyoto out of the United States market or injuring it by intentionally and falsely disparaging the quality of Toyoto's cars, hiring away its employees and engaging in other preda-

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[5]This is not to say that market concepts and parameters are not relevant to the question of intent. See Belcher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within The "Relevant Market"*, 38 Geo. Wash. L.Rev. 215 (1969).

[6]Although the federal government may have a remedy under Section 5 of the Federal Trade Commission Act, no private remedy will be available to the destroyed or injured competitor.

tory conduct? The answer is obviously no, and this Circuit has indeed followed the enlightened course and has shown the way. While some have questioned the wisdom of the doctrine embraced by *Lessig*, it has also been lauded.[7] See Turner, *Antitrust Policy and The Cellophane Case*, 70 Har. L.Rev. 281, 317-318 (1956); Belcher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within The "Relevant Market", supra; Prosecutions For Attempts to Monopolize: The Relevance of The Relevant Market*, 42 N.Y.U. L. Rev. 110 (1967); *Attempt to Monopolize: Its Elements and Their Definition*, 27 Geo. Wash. L.Rev. 227 (1958).

CONCLUSION.

It is respectfully urged that this court should grant the petition for rehearing and modify its Opinion in such a manner as to allow CTS to establish that Cornwell attempted to monopolize a part of trade and commerce by forming specific intent and engaging in

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[7]The Antitrust Division of the Department of Justice, since at least 1962, has taken the same position on this issue here urged by CTS. See Jurisdictional Statement filed in the United States Supreme Court in *United States v. The Singer Manufacturing Company* (No. 433), (decided on other grounds 374 U. S. 174 (1963)) where the Government urged:

> "The concept of 'relevant market,' as applied in cases alleging monopolization, does not come into play where the charge is attempted monopolization (see United States v. du Pont & Co., 351 U.S. 377, 395-396, n.23). All that need be shown in the latter situation is that the defendant had a specific intent to exclude competitors from any part of commerce. By its intention to exclude, the defendant has removed from the case any issue as to the 'relevant market.' "

conduct designed to drive CTS out of business or to injure it. Further, this court should hold that CTS is not required to establish a "relevant market" in order to prevail on its attempt to monopolize case. If the court doubts the correctness of this course, and in view of the importance of these issues to antitrust enforcement, we respectfully request that these related issues should be briefed and argued by the parties before the court sitting *in banc*.

DATED: July 29, 1971

Respectfully submitted,

McKENNA & FITTING
MILTON DAVIS

By /s/ Les J. Weinstein
Les J. Weinstein

Attorneys for Appellant, C.T.S. Company, Inc.

(Affidavit of Service Omitted.)

APPENDIX D.

Court's Memorandum on Motions for Directed Verdicts.

United States District Court Central District of California.

The Cornwell Quality Tools Co., a corporation, Plaintiff, vs. C.T.S. Company, Inc., a corporation, Defendant. NO 64-1456-HW.

FILED June 13, 1969.

Three manufacturers of mechanics' hand tools — SNAP-ON TOOL CO. of Kenosha, Wisconsin, MAC TOOLS, INC. and MAC ALLIED TOOLS COMPANY of Sabina and Tallmadge, Ohio, and THE CORNWELL QUALITY TOOLS CO. of Mogadore, Ohio—sell their merchandise in the States of California and Nevada under a distributor-dealer program. MAC designated its distributors "District Managers." For convenience, MAC'S "District Managers" will hereinafter be referred to as distributors.

A manufacturer would contract with a distributor to represent it in the two States; and the distributor entered into contracts with salesmen, called dealers, (commonly known as wagon men*) to sell the merchandise door-to-door in an allotted territory. Distributors sold the merchandise to the dealers who would place it in wagons or trucks and then call upon prospective purchasers, usually service stations, garages, and small manufacturing plants.

The distributors paid the manufacturers for the goods purchased, the dealers reimbursing the distributors for any goods purchased by them from the distribu-

*Salesmen, dealers, and wagon men are terms used interchangeably.

tors. In many instances the dealer or wagon man was not able to finance a truck or a "wagon" and, in addition, purchase an inventory of hand tools to stock the vehicle; many dealers, as a consequence, needed financial assistance to engage in the business of selling hand tools.

In 1947 The Cornwell Quality Tools Co. (plaintiff in this action, hereinafter described as Cornwell) and C.T.S. Company, Inc. (defendant and counter-claimant, hereinafter designate as C.T.S.) entered into an oral agreement whereby C.T.S. became the sole distributor for Cornwell in California and Nevada. C.T.S., in turn, entered into contracts with approximately thirty to thirty-five dealers who were assigned specific territories within the two States and who sold to the trade from wagons in their designated territories. Over the years such delaers became known as Cornwell dealers.

Although dealers were referred to as "Cornwell dealers", "Snap-On dealers", or "Mac dealers", such appellations were untrue, as the dealers were independent businessmen who sold Snap-On, Mac, or Cornwell tools along with products of other manufacturers; but the bulk of their stock was one of the above-named brands.

Many C.T.S. dealers needed financial assistance to go into the business as wagon men; they borrowed from the distributor (C.T.S.), agreeing to pay principal and interest in monthly installments on promissory notes which they signed. C.T.S. then endorsed the notes to Cornwell, becoming responsible for the monthly payments to Cornwell as they came due. Each month C.T.S. would send Cornwell a check to cover the

amount due on the promissory notes and would collect the payments due from the dealers on their respective notes.

There was very active competition within California and Nevada between Snap-On. Mac and Cornwell. Snap-On was the largest of the three manufacturers selling goods in California and Nevada by wagon men and did as much business as Mac and Cornwell combined. In 1964 there were approximately 150 to 200 dealers (wagon men) selling Snap-On, Mac, and Cornwell products in California and Nevada, of which number C.T.S. (the Cornwell tools distributor) had 30 to 35.

In 1964 Cornwell and C.T.S. became dissatisfied with their arrangement. Cornwell felt C.T.S. was not "pushing" Cornwell tools sufficiently, and C.T.S. resented any interference by Cornwell with its mode of operation in California and Nevada. On July 29, 1964 their agreement, under which they had operated for seventeen years, terminated.

Prior to July 29, 1964 C.T.S. had entered into negotiations with Mac Tools, Inc. and Mac Allied Tools Company (herein referred to as Mac) to represent them in California and Nevada; shortly after July 29, 1964 C.T.S. became distributor for the Mac line of hand tools in the two States and notified its dealers that C.T.S. was no longer representing Cornwell in California and Nevada, announcing that it had taken on the Mac line of hand tools.

C.T.S. induced its former Cornwell dealers to become Mac dealers; C.T.S. promised these Cornwell dealers that if they would handle the Mac line of products, C.T.S. would buy back from them all Cornwell tools which they then had on hand and, in addition, if the

dealer was obligated upon any note held by Cornwell, C.T.S. (as payee-endorser of the note) would refinance such obligation or would arrange for the refinancing thereof through local banks. As a result of these proffered inducements by C.T.S. the majority of former Cornwell dealers ceased to handle the Cornwell line and thereafter sold the Mac line, becoming known as Mac dealers.

Pursuant to its arrangement with Mac, C.T.S. took over the Mac dealers in California and Nevada and, retaining those Cornwell dealers which it had prior to July 29, 1964, had a larger number of dealers in California and Nevada than before July 29, 1964.

At the time of termination of the Cornwell-C.T.S. distributorship agreement in July, 1964, Cornwell was left without dealers in California and Nevada through whom to sell its merchandise. Consequently, Cornwell wrote to dealers (including those who had been handling Cornwell products) stating that C.T.S. no longer represented Cornwell in California and Nevada and suggesting that if dealers wished to sell Cornwell tools, arrangements would be made to supply them merchandise.

In July, 1964, upon termination of the longstanding relationship between C.T.S. and Cornwell, C.T.S. failed to pay to Cornwell amounts due on the respective promissory notes; and in its letter to former Cornwell dealers Cornwell called attention to the default in payment, reminding the dealer that under the terms of his note the entire amount was then due and payable. And on July 29, 1964 C.T.S. owed Cornwell for merchandise which it had purchased on the open book account existing between them. Cornwell made demand upon

C.T.S. for payment of the balance due and, when C.T.S. failed and refused to pay, filed the within action to recover from C.T.S., alleging that the amount then due was $14,711.39.

C.T.S. filed its ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIMS on March 26, 1965, demanding trial by jury. In this pleading C.T.S. alleged that after the oral agreement terminated (page 2, lines 12-14) Cornwell

> "* * * would accept the return of all merchandise sold to the defendant* *which the defendant had not then resold* and would repay to the defendant the purchase price thereof. * * *." *Emphasis supplied.*

On the subject of the merchandise to be returned upon cessation of the Cornwell-C.T.S. relationship, one witness at trial testified that the agreement was to take back tools "in the warehouse." Another witness testified that the agreement was to take back "tools in inventory." It was not until trial that C.T.S. contended the oral agreement to accept the return of merchandise included tools which C.T.S. had sold to dealers and *repurchased* from them.

In its effort to convert Cornwell dealers to Mac dealers, C.T.S. agreed to repurchase from them all Cornwell tools then in the dealers' possession. After such repurchase C.T.S. placed the Cornwell tools in the C.T.S. warehouse. C.T.S. contended that Cornwell's refusal to take back tools, including those repurchased from dealers by C.T.S., damaged C.T.S. to such an extent that it did not owe anything on the open book account but, rather, that C.T.S. had been damaged by such refusal in an amount much greater than

the balance alleged to be due on the open book account.

In its Answer to plaintiff's Amended Complaint C.T.S. alleged counterclaims, asserting at page 11 that Cornwell had been unlawfully attempting to monopolize

> "* * * the aforesaid interstate trade and commerce in the production, distribution and sale of tools, in violation of Section 2 of the Sherman Act (14 U.S.C. 2). * * *."

And C.T.S. further asserted (page 13) that Cornwell:

> "* * * has been continuously engaged in an unlawful combination and conspiracy and entered into unlawful contracts to unreasonably restrain interstate trade and commerce in the manufacture, distribution and sale of tools throughout the United States, all in violation of Section 1 of the Sherman Act (15 U.S.C. 1) * * *."

In its THIRD COUNTERCLAIM C.T.S. alleged (page 15) that Cornwell has, since December, 1964,

> "* * * engaged in an unlawful combination and conspiracy and entered into unlawful contracts to unreasonably restrain interstate trade and commerce in the manufacture, distribution and sale of tools in the state of California all in violation of Section 1 of the Sherman Act (15 U.S.C. 1). * * *."

The FOURTH COUNTERCLAIM charged (page 16) that Cornwell

> "* * * has violated and is now violating Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) by, in the course of commerce, discriminating directly or

indirectly, in prices charged dealers for its tools of like grade and quality * * *."

In its FIFTH COUNTERCLAIM C.T.S. asserted that (page 17) Cornwell

> "has violated and is now violating Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act (14 U.S.C. 13(c)) by, in the course of commerce, paying or granting commissions, brokerage. or other compensation, or allowances or discounts in lieu thereof, * * *."

The SIXTH COUNTERCLAIM contended (page 18) that Cornwell

> "violated and is now violating Section 3 of the Clayton Act (15 U.S.C. 14) by, in the course of commerce, making sales and contracting to sell tools, which tools are used, consumed and resold within California and Nevada on condition, agreement or understanding that the purchasers thereof shall not deal in the tools manufactured and/or distributed by competitors of Cornwell. * * *."

When the ANSWER TO AMENDED COMPLAINT AND CONTER-CLAIMS was served and filed and Cornwell was apprised of the fact that C.T.S. claimed antitrust violations, Cornwell filed its "Reply to Counterclaim" in which it alleged not only that C.T.S. owed Cornwell for goods, wares and merchandise sold and delivered but also that C.T.S. had unlawfully

> "conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states. * * *."

And plaintiff alleged that the actions and conduct of C.T.S. constituted violation of Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2).

During pretrial the court ruled that the following format would be pursued in presenting the issues at trial:

PHASE 1—OPEN BOOK ACCOUNT

Cornwell would first establish its claim of the balance due on open book account.

PHASE 2—TOOLS TO BE RETURNED

C.T.S. would present the issue of the alleged agreement for return of tools.

PHASE 3—DEFENDANT'S ANTITRUST ASSERTIONS

C.T.S. allegations of antitrust violations by Cornwell, third in order of presentation.

PHASE 4—PLAINTIFF'S CLAIM OF ANTITRUST VIOLATIONS BY C.T.S.

Cornwell would present its asserted case of antitrust violation by C.T.S.

OPEN BOOK ACCOUNT

During trial C.T.S. admitted it owed Cornwell a balance of $12,110.72 on open book account, subject to offset of damages allegedly sustained because of Cornwell's failure to take back tools.

TOOLS TO BE RETURNED

As hereinbefore mentioned, C.T.S. alleged that a part of the oral agreement between C.T.S. and Cornwell was that upon termination of their relationship Cornwell was to accept back tools sold to the defendant (C.T.S.)

"which the defendant had not then resold" and would repay to the defendant the purchase price thereof.

[sic] as to just which "returned tools" were included in the oral agreement to take back merchandise. From the evidence adduced at trial the court is of the opinion that there was some discussion between the parties on the subject of the return of tools when their relationship was intitiated; but evidently they did not deem the return tool phase of their oral contract of such importance that it should be reduced to writing. If the parties did intend that on termination of their manufacturer-distributor relationship tools were to be returned and taken back, such contract of return should have been definite and certain. Testimony at trial failed to clarify the issue.

When the oral agreement ended in July, 1964 C.T.S. did not take inventory of the Cornwell tools in its possession in its warehouse or on its shelves. Annual inventory had been taken in January, 1964, and in December, 1964 another annual inventory was taken. C.TS. contends that by using the January inventory, adding to that the goods purchased to July 29, 1964, and subtracting from that total the inventory of December, 1964 (taken five months after termination of the agreement between the parties), the inventory of Cornwell tools as of July 29, 1964 could be ascertained.

All evidence on the subject of returned tools was presented, with the exception of damages, which question was reserved until determination of liability.

DEFENDANT'S ANTITRUST ASSERTIONS

Having presented evidence on the subject of returned tools (except damages), C.T.S. then presented that

phase of its pleadings in which it alleged Cornwell had violated various antitrust laws.

Before proceeding with a discussion of what has been established in this case, it might be desirable to set forth what has not been claimed or established by C.T.S.

1. C.T.S. does not claim there has been price-fixing among the manufacturers, nor among the distributors, nor between manufacturers and distributors. In fact, there is no evidence of price-fixing whatsoever.

Distributors sold to dealers according to a list price, subject to a discount; and the dealers were to sell the merchandise according to the list price. There is no evidence that any manufacturer attempted to maintain the price of tools it manufactured.

2. There is no evidence of a division of territory among the manufacturers nor among distributors.

In representing Cornwell as distributor, C.T.S. established the policy of assigning dealers to designated territories but now objects to Cornwell doing the same thing after termination of the Cornwell-C.T.S. agreement.

3. There is no evidence in this case of any tie-in agreement between any of the parties; that is, that merchandise was sold only with the understanding that other merchandise would have to be purchased.

Although in its answer to the amended complaint C.T.S. alleged conspiracy between Cornwell and others and monopoly by Cornwell, at trial C.T.S. abandoned its

theory of conspiracy and monopoly and predicated its claim upon an alleged attempt to monopolize. The assertions of C.T.S. that Cornwell violated the antitrust laws are listed by C.T.S. as follows:

A. Termination of C.T.S. distributorship by Cornwell.

B. Cornwell's refusal to accept return of tools.

C. Establishment by Cornwell of a California warehouse to sell its tools direct to dealers (wagon men).

D. Solicitation of dealers to handle Cornwell tools and inducement to become or remain Cornwell dealers.

E. Soliciation of C.T.S. employees to become Cornwell employees.

F. Cornwell's alleged price differential between dealers and "trainee-distributors."

G. Restricting wagon men to prescribed territories.

C.T.S. admits that each of the above contentions, standing alone, is not sufficient to establish an attempt to monopolize but contends that together they indicate such an intent.

There is no question that either Cornwell or C.T.S. had a right to terminate their oral agreement at any time either so desired, with or without cause. Refusal to accept return of tools was a hotly contested issue at trial, which issue the court has resolved in favor of Cornwell.

After taking over the Mac line and acquiring the Mac dealers, C.T.S. had a great many more dealers to whom to sell than it had during existence of the Corn-

well-C.T.S. agreement; whereas Cornwell, after July 29, 1964, was in the position of having a line of merchandise to sell and no distributor to whom to sell it. Cornwell therefore determined to establish a warehouse in California and to sell from the warehouse direct (thus eliminating a distributor-middleman) to wagon men. Cornwell solicited dealers for that purpose, including dealers who bought from C.T.S., trying to induce them to either remain or to become Cornwell dealers. Also certain employees of C.T.S. were solicited and subsequently were employed by Cornwell.

C.T.S. emphasizes that there was a price differential between Cornwell's own dealers. The evidence discloses that after Cornwell established its warehouse in California and began its own distributing system Cornwell had two classes of dealers—regular dealers and "trainee-dealers." A trainee-dealer was supposed to recruit new dealers, for which recruiting he obtained a larger discount than did one who acted solely in a dealer capacity.

C.T.S. now complains that in its new set-up Cornwell restricted wagon men to prescribed territories (which practice had been that of C.T.S. for many years). The evidence shows that all distributors attempted to restrict a dealer to a certain, prescribed territory but that some dealers arranged and agreed among themselves not to invade each others territory.*

When C.T.S. had adduced the foregoing facts, counsel made an offer of proof; based upon the offer of proof the court deemed further evidence cumulative and determined that at this stage of trial it would be

*A witness testified that some dealers in San Diego agreed not to invade each others territory.

feasible to hold in abeyance further C.T.S. presentation of its antitrust claim and proceed with Phase 4 of the trial format—Cornwell's allegations of C.T.S. antitrust violations.

PLAINTIFF'S CLAIM OF ANTITRUST VIOLATIONS

In its REPLY to the C.T.S. counterclaims Cornwell alleged (page 3):

> "* * * defendant unlawfully conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states. * * *."

Upon termination of the oral agreement with Cornwell, C.T.S. made inducement to dealers (who were then selling Cornwell products) to sell Mac merchandise. There was competition among the various distributors to recruit and to retain dealers; a dealer was, consequently, a very important cog in the sales process. Snap-On had its dealers, Mac had its dealers, and C.T.S. had its dealers who sold the Cornwell line.

The only evidence of violation of the Clayton Act, as alleged by plaintiff, was that defendant (C.T.S.) had attempted to acquire for itself a substantial portion of hand tool sales to dealers in California and Nevada and had attempted to foreclose plaintiff from making sales of hand tools to such dealers in those States.

If it was proper and legal for plaintiff to solicit dealers after July 29, 1964, it was also as proper and legal for defendant, C.T.S., to attempt to retain the

dealers it already had. All distributors tried to persuade dealers to sell only those products handled by the distributors; and one of the reasons Cornwell and C.T.S. fell out was that C.T.S. was not requireing its dealers to sell only Cornwell products.

We find no more merit in plaintiff's claim of antitrust violation by C.T.S. than was found in defendants' allegations of antitrust violation by Cornwell.

Although counsel tied its claims of antitrust violation on "sale of tools", in reality the contest between plaintiff and defendant was directed to dealers. Cornwell alleged (REPLY of April 16, 1965, page 3):

> "* * *, defendant unlawfully conspired and attempted to monopolize for itself the distribution and sale of hand tools in the States of California and Nevada and attempted to foreclose plaintiff from making sales or gaining access to established dealers of such tools in such states."

C.T.S. alleged (Answer to Amended Complaint and Counterclaims filed March 26, 1965, page 11) that Cornwell

> "Established in California a wholly-owned distributorship servicing the states of California and Nevada in which states the sale and distribution of Cornwell products has been adequately developed by C.T.S. and the dealers doing business with C.T.S."

further alleging (page 12) that Cornwell

> "Solicited and is soliciting dealers doing business with C.T.S. for the purpose of inducing said dealers to buy directly from Cornwell;

"Induced and is inducing dealers doing business with C.T.S. to purchase tools directly from Cornwell;

"* * * *;

"Solicited key employees of C.T.S. for the purpose of inducing said employees to terminate their employment with C.T.S. and to become dealers buying directly from Cornwell."

C.T.S. had a large number of trained dealers, as hereinbefore described, which it did not wish Cornwell to solicit when the Cornwell-C.T.S. relationship came to an end; hence C.T.S. raised the affirmative antitrust claims in its pleading.

The ultimate purpose of antitrust legislation is to insure competition in the selling of goods in or affecting interstate commerce. As said by Mr. Justice Black in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4:

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. * * *, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition. * * *."

In *Standard Oil Co. v. United States,* 337 U.S. 293, Mr. Justice Frankfurter said (note 5):

"* * * it is the preservation of competition which is at stake, * * *."

There is no question that there was, indeed, competition among the manufacturers, distributors, and dealers. It seems to this court that this is a case in which the antitrust laws are being resorted to in an attempt to restrict rather than to enlarge the field of competition.

During the trial of this segment of the case—Phase 4—objections were made by C.T.S. to certain questions propounded by Cornwell relative to alleged antitrust violations, and Cornwell made numerous offers of proof. At the conclusion of the Cornwell testimony the court requested that counsel state the offers of proof. Based upon plaintiff's allegations as to antitrust violations by defendant, the evidence adduced, and the offers of proof, the court is of the opinion that Cornwell did not establish antitrust violation by C.T.S.

C.T.S. moved for a directed verdict relative to the Cornwell claim of antitrust violation.

During presentation of Phase 3 of the trial format—C.T.S. claims of antitrust violations by Cornwell—Cornwell had objected to numerous questions propounded by C.T.S. and to numerous exhibits offered in evidence by C.T.S. Upon the sustaining of Cornwell's objections, C.T.S. then made offers of proof; as hereinbefore mentioned (page 14, lines 3-10) the motions were continued to a future time in the proceedings, as the court did not wish at that stage of the trial to excuse the jury to hear the numerous offers of proof; but at the conclusion of Cornwell's antitrust presentation, the court then requested C.T.S. to make its offers of proof.

Inasmuch as the offers of proof presented by C.T.S. were nothing more than cumulation of testimony to bolster facts already in evidence, the court came to the conclusion that, considering the allegations of the C.T.S. counterclaims, interrogatories, admissions made during pretrial, and the offers of proof, C.T.S. had failed to sustain its burden of proof to establish antitrust violation by Cornwell.

THE JURY

When the jury was impaneled in this case two alternate jurors were selected. During trial two jurors were excused because of illness which prevented their attendance During argument of counsel on the motions for directed verdicts, the court was informed that another juror had been hospitalized and could not further attend trial. Counsel declined to continue with the eleven remaining jurors, pursuant to the provisions of Rule 48, Federal Rules of Civil Procedure.

MOTIONS FOR DIRECTED VERDICTS

Motions for directed verdicts having been properly and timely made by each counsel, said motions were disposed of as follows:

1. In favor of Cornwell on the open book account, in the sum of $12,110.72, together with interest thereon;

2. In favor of Cornwell on the issue of tools to be returned;

3. In favor of Cornwell as to the C.T.S. claim of antitrust violation;

4. In favor of C.T.S. as to the Cornwell claim of antitrust violation.

Pursuant to the court's rulings on the motions for directed verdicts there were three, separate judgments on the aspects of the case presented to the court for signature. Inasmuch as some complaint has been made as to the judgments presented, signed and filed, to clarify the judgments and to correct inadvertent error and clerical mistake in the judgments heretofore filed, the court will sign and order filed and entered one, consolidated Judgment which shall supersede and take the place of each and all the individual judgments heretofore entered in this case.

Dated this 13th day of June, 1969.

Harry C. Westover
United States Senior District Judge

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-608.

CTS COMPANY, INC.,

Petitioner,

vs.

CORNWELL QUALITY TOOLS CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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TABLE OF CONTENTS.

Statement 1

Questions Presented 2

Statement of the Case 3

Argument 5

Conclusion 7

TABLE OF AUTHORITIES.

Cases.

Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969) cert. den. 397 U.S. 912 (1970) 6

Cliff Food Stores, Inc. v. Kroeger, Inc., 417 F.2d 203 (5th Cir. 1969) 6

Industrial Building Materials v. Interchemical Corporation, 437 F.2d 1336 (9th Cir. 1970) 5

Lessig v. Tidewater Oil Company, 327 F.2d 459 (1964) 3, 5

Walker Processing Equipment v. Food Machinery, 382 U.S. 172 (1965) 5, 6, 7

Woods Exploration Producing Company, Inc. v. Aluminum Company, 304 F. Supp. 845 (D.C. Tex. 1969) 6

Statutes.

Sherman Act, Sec. 1 ..... 2, 4

Sherman Act, Sec. 2 ..... 2, 3, 4

Robinson-Patman Act, Sec. 2(a) 2, 4

Robinson-Patman Act, Sec. 2(c) 4

Clayton Act, Sec. 3 ..... 2, 3, 4

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STATEMENT.

Respondent Cornwell Quality Tools Co. ("Cornwell") agrees that the Petition for Writ of Certiorari of CTS Co., Inc. ("CTS") correctly sets forth the required references to opinions of the courts below, the jurisdictional grounds for this Court's review, and necessary citations and a verbatim quotation of the relevant statutes involved. Respondent does not agree that the questions presented are properly stated and it therefore restates them as follows:

QUESTIONS PRESENTED.

1. Did the Petitioner at the time of trial introduce or offer to introduce proof of facts sufficient to present a jury question on its claims under Section 2 of the Sherman Act on the issue of attempted monopolization when it failed to offer any evidence as to Respondent Cornwell's specific intent to monopolize and of the extent of the relevant product market?

2. Did Petitioner introduce or offer to introduce proof of facts sufficient to permit a jury to determine that Respondent Cornwell had violated Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 2(a) of the Robinson-Patman Act so that the specific intent otherwise necessary for attempted monopolization under Section 2 of the Sherman Act need not have been shown?

STATEMENT OF THE CASE.

The statement of the case by CTS is correct with respect to the allegations made in its counterclaim to the complaint of its former supplier, Cornwell. It alleged the numerous antitrust violations that are detailed therein. After four years of discovery which included depositions, interrogatories, requested admissions of fact and law, and production of innumerable documents and records by Cornwell, the case finally proceeded to trial over the objection of CTS. With respect to antitrust violations, it began its case with respect to Sherman Act charges first. After concluding with several witnesses and the introduction of a number of documents, it proceeded on to the production of evidence directed to its claimed violations of Section 3 of the Clayton Act. It was at this point that the trial court instructed counsel to make an offer of proof with respect to both the matters as to which it had been overruled in questioning witnesses and as to any other other evidence intended to support its claims. In the course of the offer, it contended that it need not introduce any evidence as to the relevant product market in support of its Section 2, Sherman Act Claims (CT 1268, 1388, 1624) and made no offer of evidence as to any specific intent on the part of the defendant relative to the charge of attempted monopolization. It simply asserted that it had in fact shown all of the elements necessary in the case of such violation relying entirely on the opinion of the Ninth Circuit Court of Appeals in *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (1964).

The trial court directed a verdict against CTS after construing most favorably to it all of the statements of its counsel in the course of the offer of proof together with the substantial quantity of actual proof introduced. It found the Petitioner's case inadequate both as to the

portions in which the actual testimony and documentary evidence were introduced and the portions as to which counsel had simply promised evidence (Petition for Writ, Appendix D, pages 12D, 13D).

The Court of Appeals affirmed the lower court with respect to the claimed violations of Section 2 of the Sherman Act and one of the charges under Section 1 of the Sherman Act, concluding that nothing had been actually offered or introduced which would be sufficient to present a claim to the jury. It apparently considered the assertions of counsel making the offer that the CTS case was sufficient to be a mere conclusion of law. It accepted for purposes of review, however, the description of counsel as to prospective evidence to be introduced as to the remaining Clayton Act, Section 3 and Robinson-Patman Act, Section 2(a) and Section 2(c) charges. It found the description of the evidence sufficient to sustain the possibility of a prima facie case for the Clayton Act Section 3 and Robinson-Patman Act Section 2(a) charges but held that Section 2(c) of the Robinson-Patman Act could not apply to the factual setting claimed to have existed by CTS. It also held that irrespective of the sufficiency of the evidence actually directed to the point, CTS should be given a chance to show whether there had been a violation of Section 1 of the Sherman Act on a theory of termination of the distributorship by reason of a refusal by CTS to enter into an exclusive dealing arrangement.[1]

---

[1] The Court of Appeals on this point made an assumption both that CTS had claimed that there was ever such a proposal for exclusive dealing and that Cornwell had terminated CTS's distributorship (Petition for Writ, Appendix A, pages 3A, 11A). The trial court had found for Cornwell as to CTS's charge that Cornwell had terminated the relationship between them (Petition for Writ, Appendix D, page 11D).

ARGUMENT.

This case does not raise an important question of federal law remaining to be settled by this Court as the Petitioner asserts. Notwithstanding the unarguable contention that the antitrust laws are important and that Section 2 of the Sherman Act provides a method for aggrieved parties to remedy anticompetitive activities, the case does not offer a basis to decide an important question of law. The argument that the ruling in the Court of Appeals conflicts with an earlier holding in the *Lessig v. Tidewater Oil Company, supra,* does nothing more than urge the correction of error claimed to have occurred in this particular case. It should be noted, however, that the Ninth Circuit Court of Appeals does not itself recognize a conflict between the two holdings, perhaps taking note of the observation made in the opinion denying the petition for rehearing in *Lessig* as follows:

> 327 F.2d at page 478.
>
> "Part III of the opinion is to be read with the remainder, and in light of the anti-competitive purposes and conduct to which the case relates."

Even though it may be argued that the ruling in this case is inconsistent with *Lessig, supra,* and the later holding in *Industrial Building Materials v. Interchemical Corporation,* 437 F.2d 1336 (9th Cir. 1970), the Court of Appeals either rejects the argument of conflict or now rules in a manner more consonant with the dictum in *Walker Processing Equipment v. Food Machinery,* 382 U.S. 172 (1965), wherein Mr. Justice Clark said:

> "To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the legal patent claim in

> terms of the relevant market for the product involved. Without a definition of that market, there is no way to measure Food Machinery's ability to lessen or destroy competition." (at page 172)

Courts in other circuits have consistently followed the view in *Walker Processing Equipment* even if the Ninth Circuit Court of Appeals should be considered as having arrived only recently to a full acceptance of the view as to the necessity of a product market definition. See *Cliff Food Stores, Inc. v. Kroeger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Woods Exploration Producing Company, Inc. v. Aluminum Company*, 304 F. Supp. 845 (D.C. Tex. 1969); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969) cert. den. 397 U.S. 912 (1970).

The Petitioner defines the issue raised to this Court as one of the proper definition of attempted monopolization saying that the question encompasses both the issue of "specific intent" and the extent to which ability to monopolize must be shown (Petition for Writ, page 14). Even accepting that theory of the issue upon which the Court should grant review, the record in the case below would not provide any basis to come to any meaningful rule. Despite the length of the record and the substantial number of documents introduced, Petitioner can cite no portion of the record sufficient to establish that it made any case at all either as to a specific intent to monopolize or the extent of the product market. As to the element of intent, it argues simply that certain inferences are adequate; as to the product market, it asserts that no evidence at all is necessary. On this important provision of the Sherman Act, approximately 2500 pages of records and dozens of documents would thus offer substantially nothing more than would the allegations of the Counterclaims

as a basis for this Court to now eliminate the evidentiary burden summarized in the *Walker Processing Equipment* dictum and elaborated in the many cases in the lower courts both before and since that case.

CONCLUSION.

The petition for writ of certiorari should be denied.

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REPLY BRIEF OF THE PETITIONER

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October Term, 1971
No. 71-608

C.T.S. COMPANY, INC.,

Petitioner,

vs.

CORNWELL QUALITY TOOLS CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Respondent, Cornwell Quality Tools Co. ("Cornwell"), in its Brief of Respondent in Opposition ("Opposition") to the Petition for Writ of Certiorari states it does not agree that the questions are properly stated and chooses to restate them. For the reasons set forth, *infra*, even the questions as restated demonstrate not only the error of the Court of Appeals but that the issues here presented are substantial and of compelling interest with regard to antitrust enforcement.

In the first of the two restated questions, respondent tries to save the error of the Court of Appeals by posing the elements of attempt to monopolize as of necessity requiring the proof of a "relevant product market". Respondent ignores the fact that the Court of Appeals purported not to reach the issue of market power with

regard to the attempt to monopolize claim (Appendix A to the Petition, p. 12A), and it further ignores the fact that the Court of Appeals in regard to the other antitrust claims which were remanded for trial, based on the offers of proof, expressly reserved to petitioner the right to prove up a "relevant market" (Petition, Appendix A. p. 6A).

On page 3 of its Opposition, respondent implies that CTS was unwilling to "introduce any evidence as to the relevant product market in support of its Section 2, Sherman Act claims . . ."; it fails to bring to this Court's attention that it was CTS's position at all times that CTS need not do so in view of *Lessig*, but stood ready and willing to do so.[1]

With regard to the second restated question, Cornwell recognizes that the Court of Appeals' decision in allowing CTS on remand to prove up its case under Section 1 of the Sherman Act, Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act (including "predatory intent") is irreconcilable with the

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[1]In CTS's Reply and Answering Brief (p. 19) in the Court of Appeals, CTS summarized the record below as follows:

> "Cornwell would lead this court to believe that CTS was not planning to define the relevant market for Sherman Act purposes or the lines of commerce for Clayton and Robinson-Patman Act purposes. It would further want the record to appear as though CTS was closed on these issues and failed to define them.
>
> "While it is true that CTS contends that under *Lessig v. Tidewater Oil*, 327 F.2d 469 (9th Cir. 1964), there is no need to define the relevant product market in an 'attempt to monopolize' case as opposed to a monopolization case (see *United States v. Dupont*, 351 U.S. 377 [f.n. 23] (1956)), it was clearly prepared to do so. See C.T. 1624, 1421-1426. The determination of the boundaries of the product market is a question of fact (*United States v. Dupont, supra*), here to be reserved to the jury under proper instructions."

determination that the full spectrum of facts relevant to those three claims could not constitute the "specific intent" necessary under Section 2 of the Sherman Act. Hence, in its "restatement" of the question it tries to salvage its position by suggesting that the Court of Appeals erred in allowing CTS to retry those three claims and hence that the Section 2 attempt to monopolize claims should fail.[2]

Respondent's Opposition fails to deal with the items evidence introduced and offered by CTS to establish the requisite specific intent, which evidence is summarized in CTS's Petition for Writ of Certiorari (pp. 8-9). That evidence, we submit, is sufficient to establish the necessary specific intent; taken together with the evidence relevant to the other three antitrust claims, it is more than required.

The misleading nature of respondent's Opposition is further illustrated by its foonote 1 in which it is represented that "The trial court had found for Cornwell as to CTS's charge that Cornwell had terminated the relationship between them (Petition for Writ, Appendix D, p. 11D)." Just how the trial court could make a "finding" in favor of Cornwell on this issue in the face of uncontradicted evidence to the contrary [R.T. 805-810; C.T. 1432-1433, 144] and before CTS rested its case, is left to the imagination of the reader.[3] The

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[2]It should be noted that in Cornwell's "Conditional Cross-Petition for Writ of Certiorari" filed in No. 71-697, Cornwell does not affirmatively urge that the Court of Appeals erred with regard to allowing CTS to proceed to trial on these other three anti-trust claims hence the determination of the Court of Appeals on this issue is final and Cornwell should not be heard to object to the correctness of that aspect of the decision (See CTS's Brief of Respondent in Opposition in 71-697).

[3]Respondents' reference to Appendix D, p. 11D does not, as claimed, support the statement made.

Court of Appeals opinion states that it was Cornwell that terminated the distributorship (Petition, Appendix A, p. 3A); Cornwell did not there or in the trial court contend to the contrary.

The confusion existing in the federal courts with regard to the issues relating to attempted monopolization presented by the Petition is recognized by respondent (Opposition, p. 5) and is further demonstrated by the three cases cited by respondent. In *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 5th Cir., (1969), no reference is made to *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (1964) with which opinion it conflicts. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 304 F.Supp. 845 S.D. Tex., (1969), the court stated that "this case involves alleged violations of Section 1 of the Sherman Act . . ." yet it goes on to deal with an analysis of attempted monopolization. That case does discuss *Lessig* and expressly rejects it:

> "The cases that *Lessig* relies on speak in terms of 'dangerous probability' of the monopoly, etc., coming to pass. However, *Lessig* seems to go a step further. It holds that a finding of specific intent to monopolize is sufficient notwithstanding the probability of success. This Court refuses to take that additional step." [304 F.Supp. at 850.]

The Seventh Circuit in *Bernard Food Industries, Inc. v. Dietene Company*, 415 F.2d 1279, 1284, 7th Cir., (1969), like the Fifth Circuit in *Cliff Food Stores, supra*, ignores *Lessig* and fails to draw any meaningful distinction between attempted monopolization and monopolization with regard to the necessity of showing market power. The questions presented are vital;

confusion abounds! Furthermore, the summary disposition of this case does not comport with the admonition of *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) to use summary procedures sparingly in complex antitrust litigation.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Dated: December 23, 1951.

Respectfully submitted,

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